

Item W06-10 Response Form

Title: **Private professional guardians of the person** (amend rule 7.1010 of the California Rules of Court)

- ☐ **Agree** with proposed changes
- ☐ **Agree** with proposed changes **if modified**
- ☐ **Do not agree** with proposed changes

Comments: _____

Name: _____ **Title:** _____

Organization: _____

☐ **Commenting on behalf of an organization**

Address: _____

City, State, Zip: _____

Please **write** or **fax** or **respond using the Internet** to:

Address: Ms. Romunda Price,
Judicial Council, 455 Golden Gate Avenue,
San Francisco, CA 94102
Fax: (415) 865-7664 **Attention:** Romunda Price
Internet: www.courtinfo.ca.gov/invitationstocomment

DEADLINE FOR COMMENT: 5:00 p.m., Monday, January 23, 2006
--

Your comments may be written on this *Response Form* or directly on the proposal or as a letter. If you are not commenting directly on this sheet please remember to attach it to your comments for identification purposes.

*Circulation for comment does not imply endorsement by the Judicial Council
or the Rules and Projects Committee
All comments will become part of the public record of the council's action.*

Invitation to Comment W06-10

Title	Private professional guardians of the person (amend rule 7.1010 of the California Rules of Court).
Summary	The proposed amendment to rule 7.1010 would modify the definition of a private professional guardian under the rule by excluding guardians of the person only, to conform to changes made by the 2005 Legislature in the underlying statutory definition of that term.
Source	Probate and Mental Health Advisory Committee Hon. Don Edward Green, Chair
Staff	Douglas C. Miller, Committee Counsel, (415)-865-7535, douglas.miller@jud.ca.gov
Discussion	<p><u>Rule 7.1010</u></p> <p>Rule 7.1010 of the California Rules of Court, concerning private professional guardians, was adopted by the Judicial Council on November 4, 2005, effective January 1, 2006. Rule 7.1010 was adopted in response to Assembly Bill 1155 in the 2004 Legislature (Stats. 2004, ch. 625). This legislation directed the Judicial Council to prescribe by court rule the qualifications and continuing education to be required of private professional guardians.</p> <p>Private professional guardians must file annual information statements with the courts that appoint them (Prob. Code, §§ 2340–2344) and must also register with the Department of Justice’s Statewide Registry of Private Conservators, Guardians, and Trustees (Prob. Code, §§ 2850–2855).</p> <p>When rule 7.1010 was considered by the council, a private professional guardian was defined in Probate Code section 2341(b) as the guardian of the person or estate, or both, of two or more wards at the same time who are not related to the guardian by blood or marriage.¹ This definition was incorporated in the rule at paragraphs 7.1010(a)(5) and (6).</p>

¹ Rule 7.1010(a)(6) defines an “unrelated minor” to include a minor unrelated to his or her guardian by blood, marriage, or *domestic partnership*, an expansion of the statutory definition impliedly required by the California Domestic Partner Rights and Responsibilities Act of 2003 (Stats. 2003, ch. 421, §§ 2, 4). See Family Code section 297.5(a) and (l).

The Judicial Council was authorized by Assembly Bill 1155 to exempt guardians of the person only from the requirements of the rule even though they are within the statutory definition of a private professional guardian in section 2341(b) and therefore must file information statements and register with the Statewide Registry.² The council did so when it adopted rule 7.1010. Rule 7.1010(b), concerning the qualifications of a private professional guardian that must be met as a condition of appointment, expressly applies only to appointments of guardians of the estate or the person and estate. Rule 7.1010(j) further provides:

Notwithstanding any other provision of this rule, a private professional guardian of the person only of two or more unrelated minors is exempt from the requirements of this rule.

Probate Code section 2341(b) also authorizes a court to require a guardian of the person, estate, or both of only one unrelated ward (and thus not within the definition of a private professional guardian) to comply with the requirements for such guardians to file information statements with appointing courts and to register with the Statewide Registry. Under rule 7.1010(a)(5) such a guardian is also subject to the qualification and continuing education requirements of the rule unless he or she is the guardian of the person of the child only and is therefore exempt under rule 7.1010(j).

Assembly Bill 541

Governor Schwarzenegger signed Assembly Bill 541 into law on September 22, 2005, as Stats. 2005, ch. 302, effective January 1, 2006. This legislation changes the definition of private professional guardian in Probate Code section 2341(b) by referring to guardians of the estate in the opening sentence, thereby excluding guardians of the person only from the definition. The new legislation also authorizes a court to exercise its discretion to require a guardian of the person of one or more wards to file an information statement with the court and register with the Statewide Registry if the guardian receives compensation for performing services as guardian.

The advisory committee has concluded that Assembly Bill 541

² Stats. 2004, ch. 625, § 1c, an uncodified portion of Assembly Bill 1155. A copy of this portion of the legislation is attached to this Invitation to Comment.

requires changes in rule 7.1010.

Proposed changes in rule 7.1010

Rule 7.1010(a)(5), a definitional provision, would be changed to refer to one *or more* rather than to one unrelated minor, to give effect to the additional basis for judicial discretion added by Assembly Bill 541. A similar modification would also be made in the first portion of rule 7.1010(j), the exemption for guardians of the person, for the same reason.

Subdivision (b) of the rule would be modified by eliminating references to a guardian of the estate or the person and estate. The revised definition of a private professional guardian in Probate Code section 2341(b) as a guardian of the estate makes these references unnecessary.

Rule 7.1010(j), the exemption from the rule for guardians of the person only, would be retained but would be modified by adding the following at the end of the provision:

. . . except that in the exercise of its discretion, a court that requires a guardian of the person only to comply with the provisions of article 4 of chapter 4 of part 4 of division 4 of the Probate Code (commencing with section 2340) because the guardian receives compensation for acting as guardian may also require the guardian to comply with this rule.

The revised rule 7.1010(j) addresses the judicial discretion added to Probate Code section 2341(b) by Assembly Bill 541. As noted above, the revised statute authorizes a judicial officer to require an otherwise exempt guardian of the person to file an information statement and register with the Statewide Registry as a professional guardian because he or she is receiving compensation. The revised rule would grant the judicial officer the additional discretion to decide whether such a guardian must also comply with the qualification and continuing education requirements of the rule.³

The advisory committee concludes that the Judicial Council has

³ The amended rule would remain unchanged in that no discretion would be given to a court to apply to or waive the requirements of the rule for a guardian of the estate or person and estate of one ward whom the court has required to comply with the Probate Code provisions applicable to private professional guardians under Probate Code section 2341(b) as it existed before enactment of Assembly Bill 541.

G:\LGL_SVCS\LEGAL\INVITES\W06\Proposals\Probate\PrivatProfGuardian\ITC v4 120705.DOC

authority to provide for this additional exercise of judicial discretion because the provision is not inconsistent with Assembly Bill 541 and because the council's previous grant of discretion concerning guardians of the person in Assembly Bill 1155 remains in effect.

Adoption effective July 1, 2006

Because the statutory definition of private professional guardian modified by Assembly Bill 541 is explicitly incorporated into rule 7.1010, the rule needs revision as soon as possible. The soonest this can occur is July 1, 2006, after the proposed amended rule has been circulated for public comment. The advisory committee believes the expedited effective date is warranted.

A copy of the proposed revised rule 7.1010 is attached at page 5.

A copy of the uncodified portion of Assembly Bill 1155 is attached at pages 6–8.

A copy of Assembly Bill 541 is attached at pages 9–12.

Attachment

Rule Proposal

Rule 7.1010 of the California Rules of Court would be amended, effective July 1, 2006, to read:

1 **Rule 7.1010. Qualifications and continuing education requirements for private**
2 **professional guardians**
3

4 **(a) [Definitions]** For purposes of this rule:
5

6 * * *

7
8 (5) The term “private professional guardian” has the meaning specified in
9 Probate Code section 2341(b), including a guardian of one or more
10 unrelated minors whom an appointing court has required to comply with
11 article 4 of chapter 4 of part 4 of division 4 of that code (commencing
12 with section 2340).
13

14 * * *

15
16 **(b) [Qualifications for appointment]** Except as otherwise provided in this rule,
17 effective January 1, 2006, a court may not appoint a private professional
18 guardian as guardian of ~~the estate or guardian of the person and estate of~~ an
19 unrelated minor unless on the date of the order of appointment, the private
20 professional guardian:
21

22 * * *

23
24 **(j) [Exemption of guardians of the person]** Notwithstanding any other
25 provision of this rule, a private professional guardian of the person only of ~~two~~
26 one or more unrelated minors is exempt from the requirements of this rule,
27 except that in the exercise of its discretion, a court that requires a guardian of
28 the person only to comply with the provisions of article 4 of chapter 4 of part 4
29 of division 4 of the Probate Code (commencing with section 2340) because the
30 guardian receives compensation for acting as guardian may also require the
31 guardian to comply with this rule.

Legislative Counsel's Digest and Section 1 of AB 1155

CHAPTER 625

FILED WITH SECRETARY OF STATE SEPTEMBER 21, 2004

APPROVED BY GOVERNOR SEPTEMBER 21, 2004

INTRODUCED BY Assembly Member Liu

An act to amend Sections 2342.5 and 2850 of, and to add Section 2344 to, the Probate Code, relating to conservators and guardians.

LEGISLATIVE COUNSEL'S DIGEST

AB 1155, Liu. Conservators and guardians: educational requirements. Existing law defines private professional conservators and private professional guardians and requires them to file specified information with the courts and to provide a specified declaration to a statewide registry. Existing law permits a person authorized by nonprofit, private entities to perform conservatorship functions to satisfy certain filing requirements a specified way. Existing law prohibits a court from appointing these guardians and conservators unless they are registered. A guardian or conservator who signs a declaration, as described above, that asserts the truth of any material matter which he or she knows to be false is guilty of a misdemeanor. Existing law establishes the Judicial Council and requires it to adopt rules relating to the administration of courts.

This bill would require the Judicial Council, on or before January 1, 2006, to adopt a rule of court that specifies the qualifications of private professional conservators and guardians, including certain educational requirements. The bill would require the Judicial Council to consult with specified parties in formulating the rule, and would permit the Judicial Council to include provisions waiving the requirements in cases of undue hardship. The bill would require private professional conservators and private professional guardians, other than persons who are appointed as a guardian of the person, as specified, to comply with these Judicial Council requirements, and would prohibit these guardians and conservators from registering with the Statewide Registry if they fail to fulfill these educational requirements. The bill would specify that a private professional conservator authorized by a nonprofit, private entity to perform conservatorship functions, as described above, is required to fulfill the educational requirements established by the Judicial Council for these conservators.

By changing the definition of a crime, this bill would create a state-mandated local program. The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

This bill would incorporate additional changes in Section 2850 of the Probate Code proposed by SB 1248 that would become operative only if SB 1248 and this bill are both chaptered and become effective on or before January 1, 2005.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1.

- (a) On or before January 1, 2006, the Judicial Council shall adopt a rule of court that shall do all of the following:
 - (1) Specifies the qualifications of a private professional conservator or private professional guardian.
 - (2) Specifies the number of hours of education in classes related to the duties of the conservator or guardian that a private professional conservator or private professional guardian must complete each year.
 - (3) Specifies the particular subject matter that may be included in the education required each year.
 - (4) Requires a private professional conservator or private professional guardian to certify to the court the completion of the yearly specified hours of education.
- (b) In formulating the rule required by this section:
 - (1) The Judicial Council shall consult with interested parties, including, but not limited to, the Professional Fiduciary Association of California, the California Bar Association, the National Guardianship Association, and the Association of Professional Geriatric Care Managers.

- (2) The Judicial Council may include provisions that allow courts to waive the educational requirements in individual cases when compliance would constitute an undue hardship.
- (c) In formulating the rule described by this section, the Judicial Council is not required to include provisions regarding the qualifications or educational requirements of an individual who is appointed by the court pursuant to Section 1514 as a guardian of the person only.

Assembly Bill No. 541

CHAPTER 302

An act to amend Section 3041.5 of the Family Code, and to amend Sections 2341 and 2854 of the Probate Code, relating to guardians.

[Approved by Governor September 22, 2005. Filed with
Secretary of State September 22, 2005.]

LEGISLATIVE COUNSEL'S DIGEST

AB 541, Harman. Guardians.

(1) Existing law, until January 1, 2008, authorizes a court to require any parent who is seeking custody of, or visitation with, a child who is the subject of a custody proceeding, to undergo testing for the illegal use of controlled substances and the use of alcohol under specified circumstances. Existing law requires the court to order the least intrusive method of testing. Existing law requires that testing be in conformity with certain federal procedures, provides that the results of this testing shall be confidential and maintained as a sealed record, and permits a parent or legal custodian who is tested to contest the test results at a hearing.

This bill would also authorize a court to require any person who is seeking custody of, or visitation with, a child who is the subject of a guardianship proceeding, to undergo drug testing pursuant to the above-described procedures.

(2) Existing law requires the Department of Justice to maintain a Statewide Registry of conservators and guardians, and requires all persons who wish to serve as a conservator or guardian, or who are currently serving as a conservator or guardian, to register and reregister with the Statewide Registry. Existing law authorizes the court to require any person who is the guardian for only one ward unrelated to the guardian by blood or marriage to comply with those provisions.

This bill would further authorize the court to require any person who is the guardian of the person, unrelated to the ward, and who receives compensation for acting as guardian of the person to comply with those provisions.

The people of the State of California do enact as follows:

SECTION 1. Section 3041.5 of the Family Code is amended to read:

3041.5. (a) In any custody or visitation proceeding brought under this part, as described in Section 3021, or any guardianship proceeding brought under the Probate Code, the court may order any person who is seeking custody of, or visitation with, a child who is the subject of the proceeding to undergo testing for the illegal use of controlled substances and the use

of alcohol if there is a judicial determination based upon a preponderance of evidence that there is the habitual, frequent, or continual illegal use of controlled substances or the habitual or continual abuse of alcohol by the parent, legal custodian, person seeking guardianship, or person seeking visitation in a guardianship. This evidence may include, but may not be limited to, a conviction within the last five years for the illegal use or possession of a controlled substance. The court shall order the least intrusive method of testing for the illegal use of controlled substances or the habitual or continual abuse of alcohol by either or both parents, the legal custodian, person seeking guardianship, or person seeking visitation in a guardianship. If substance abuse testing is ordered by the court, the testing shall be performed in conformance with procedures and standards established by the United States Department of Health and Human Services for drug testing of federal employees. The parent, legal custodian, person seeking guardianship, or person seeking visitation in a guardianship who has undergone drug testing shall have the right to a hearing, if requested, to challenge a positive test result. A positive test result, even if challenged and upheld, shall not, by itself, constitute grounds for an adverse custody or guardianship decision. Determining the best interests of the child requires weighing all relevant factors. The court shall also consider any reports provided to the court pursuant to the Probate Code. The results of this testing shall be confidential, shall be maintained as a sealed record in the court file, and may not be released to any person except the court, the parties, their attorneys, the Judicial Council (until completion of its authorized study of the testing process) and any person to whom the court expressly grants access by written order made with prior notice to all parties. Any person who has access to the test results may not disseminate copies or disclose information about the test results to any person other than a person who is authorized to receive the test results pursuant to this section. Any breach of the confidentiality of the test results shall be punishable by civil sanctions not to exceed two thousand five hundred dollars (\$2,500). The results of the testing may not be used for any purpose, including any criminal, civil, or administrative proceeding, except to assist the court in determining, for purposes of the proceeding, the best interest of the child pursuant to Section 3011, and the content of the order or judgment determining custody or visitation. The court may order either party, or both parties, to pay the costs of the drug or alcohol testing ordered pursuant to this section. As used in this section, “controlled substances” has the same meaning as defined in the California Uniform Controlled Substances Act, Division 10 (commencing with Section 11000) of the Health and Safety Code.

(b) This section shall remain in effect only until January 1, 2008, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2008, deletes or extends that date.

SEC. 2. Section 2341 of the Probate Code is amended to read:

2341. (a) As used in this article, “private professional conservator” means a person or entity appointed as conservator of the person or estate,

or both, of two or more conservatees at the same time who are not related to the conservator by blood or marriage, except a bank or other entity authorized to conduct the business of a trust company, or any public officer or public agency including the public guardian, public conservator, or other agency of the State of California. In the case of an entity, all natural persons who are authorized by the entity to perform the functions of a conservator shall comply with this article. The court may, at its discretion, require any person who is the conservator for only one conservatee not related to the conservator by blood or marriage to comply with this article, and in that case, references in this article to a “private professional conservator” include those persons.

(b) As used in this article, “private professional guardian” means a person or entity appointed as guardian of the estate of two or more wards at the same time who are not related to the guardian by blood or marriage, except a bank or other entity authorized to conduct the business of a trust company, or any public officer or public agency including the public guardian, public conservator, or other agency of the State of California. In the case of an entity, all natural persons who are authorized by the entity to perform the functions of a guardian shall comply with this article. The court may, at its discretion, require any person who is the guardian for only one ward not related to the guardian by blood or marriage to comply with this article, and in that case, references in this article to a “private professional guardian” include those persons. The court may also, at its discretion, require any person who is a guardian of the person not related to the ward by blood or marriage and who receives compensation for acting as guardian of the person to comply with this article, and in that case, references in this article to a “private professional guardian” include those persons. However, as used in this article, “private professional guardian” does not include an unrelated guardian of the person of a minor appointed by the court, if the appointment results from the selection of a permanency plan for a dependent child or ward pursuant to Section 366.26 of the Welfare and Institutions Code. It also does not include an unrelated guardian of the person of a minor appointed by the court pursuant to Section 1514 if that child is in receipt of AFDC-FC payments and case management services from the county welfare department, as evidenced by a Notice of Action of AFDC-FC eligibility.

(c) As used in this article, “private professional trustee” means a nonprofit charitable corporation appointed as trustee pursuant to Section 15604.

SEC. 3. Section 2854 of the Probate Code is amended to read:

2854. (a) This chapter does not apply to any public conservator or public guardian with regard to his or her official acts in that capacity.

(b) This chapter does not apply to any conservator, guardian, or trustee when the person is related to the conservatee, ward, or trustor by blood, marriage, adoption, registered domestic partnership, or a relationship that satisfies the requirements of subdivision (a) and paragraphs (1) to (4),

inclusive, and paragraph (6) of subdivision (b) of Section 297 of the Family Code.

(c) This chapter does not apply to any trustee who is serving for the benefit of not more than three people or not more than three families, or a combination of people or families that does not total more than three. The number of trust beneficiaries does not count for the purposes of calculating if a trustee falls within this exclusion. A trust excluded under subdivision (a) or (b) does not count for the purpose of calculating if a trustee falls within this exclusion. For the purposes of this subdivision, family means people who are related by blood, marriage, adoption, registered domestic partnership, or a relationship that satisfies the requirements of subdivision (a) and paragraphs (1) to (4), inclusive, and paragraph (6) of subdivision (b) of Section 297 of the Family Code.

(d) This chapter does not apply to any conservator or guardian who is not required to file information with the clerk of the court pursuant to Section 2340, to any person or entity subject to the oversight of a local government, including an employee of a city, county, or city and county, or to any person or entity subject to the oversight of the state or federal government, including an attorney licensed to practice law in the State of California who acts as trustee of only attorney client trust accounts, as defined in Section 6211 of the Business and Professions Code.

(e) This chapter does not apply to any conservator who resided in the same home with the conservatee immediately prior to the condition or event that gave rise to the necessity of a conservatorship. This subdivision does not create any order or preference of appointment, but simply exempts a conservator described by this subdivision from registration.

(f) This chapter does not apply to a trustee who is any of the following:

- (1) Trust companies, as defined in Section 83.
- (2) FDIC-insured institutions, their holding companies, subsidiaries, or affiliates. For the purposes of this paragraph, “affiliate” means any entity that shares an ownership interest with or that is under the common control of, the FDIC-insured institution.
- (3) Employees of any entity listed in paragraph (1) or (2) while serving as trustees in the scope of their duties.